Supreme Court, U. S.
FILED
JAN 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1035

BETHLEHEM STEEL CORPORATION,
Petitioner,
v.
JOHN QUARLES,
ACTING ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN MCN. CRAMER
REED SMITH SHAW & MCCLAY
P. O. Box 2009
Pittsburgh, Pa. 15230
Counsel for Petitioner

Dated: January 28, 1977

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of Facts	4
Reasons for Granting the Writ	8
Conclusion	13
Appendix A Opinion of the Court of Appeals	1a
Appendix B Legal Opinion of the General Counsel of EPA	18a
Appendix C Decision of the Regional Administrator of Region III of EPA	22a
Appendix D Decision of the Administrator of EPA	25a
Appendix E Factual Stipulation between the Environmental Protection Agency and Bethlehem Steel Corporation	30a

TABLE OF CITATIONS

Cases

American Iron and Steel Institute v. EPA, 526 F.2d 1027 (3rd Cir. 1975)	6
Republic Steel Corp. v. Train, et al., Docket No. 76-1557 in the Court of Appeals for the Sixth Circuit	9
State Water Control Board v. Train, ... F. Supp. ....., 8 ERC 1609 (E.D. Va. 1976)	9
Union Electric Co. v. EPA, ... U.S. ....., 49 L. Ed. 2d 474, 96 S. Ct. 2518 (1976)	10

Statutes and Rules.

STATUTES AND RULES	PAGE
Federal Water Pollution Control Act, As Amended	
Section 301(b) 86 Stat. 844, 33 U.S.C. §1311(b)	3
Section 301(b)(1)(A) 86 Stat. 844, 33 U.S.C. §1311(b)(1)(A)	11
Section 304(b) 86 Stat. 850, 33 U.S.C. §1314(b)	11
Section 309(c)(1) 86 Stat. 859, 33 U.S.C. §1319(c)(1)	8
Section 309(c)(3) 86 Stat. 859, 33 U.S.C. §1319(c)(3)	8
Section 309(d) 86 Stat. 859, 33 U.S.C. §1319(d)	8
Section 402 86 Stat. 880, 33 U.S.C. §1342	4
Section 502 86 Stat. 886, 33 U.S.C. §1362	3
Section 502(11) 86 Stat. 886, 33 U.S.C. §1362	11
Section 505 86 Stat. 888, 33 U.S.C. §1365	9, 10
28 U.S.C. §1254(1)	2
FEDERAL REGULATIONS	
40 C.F.R. §125.36	5
40 C.F.R. §125.36(m)	5
40 C.F.R. §125.36(n)	5
OTHER	
BNA Environment Reporter, Current Developments Section, Vol. 7, No. 6 (June 11, 1976)	9
Environmental Policy Division of the Library of Congress, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93 Cong., 1st Sess., (Cong. Print 1973)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

BETHLEHEM STEEL CORPORATION,
Petitioner,
v.
JOHN QUARLES,
ACTING ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Bethlehem Steel Corporation (hereinafter sometimes "Bethlehem"), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit rendered in these proceedings on November 1, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 544 F.2d 657. It also appears at Appendix A infra, p. 1a. The legal opinion of the General Counsel of the Environmental Protection Agency (hereinafter "EPA"), the decision of the Regional Administrator of Region III of EPA and the decision of the Administrator of EPA are not reported and appear at Appendix B, C and D respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1976. The petition was filed less than 90 days from that date. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act Amendments of 1972 require the Administrator of EPA to impose in a National Pollutant Discharge Elimination System ("NPDES") permit a compliance date of July 1, 1977 for effluent limits based on best practicable control technology currently available in a case where it is undisputed that the permittee commenced timely design, purchase and installation of control facilities and is presently engaged in installing best practicable control technology currently available or its equivalent and that despite the best efforts of the permittee, the installation cannot be completed before July 1, 1979?

2. In the event that the preceding question is answered in the affirmative, do the Federal Water Pollution Control Act Amendments of 1972 deny the permittee due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

"No person shall . . . be deprived of life, liberty or property without due process of law . . ."

FEDERAL WATER POLLUTION CONTROL ACT:

Section 301(b), as amended 86 Stat. 844, 33 U.S.C. §1311(b):

"In order to carry out the objective of this Act there shall be achieved—

> (1)(A) Not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of this Act. . . ."

Section 502, as amended 86 Stat. 886, 33 U.S.C. §1362:

"Except as otherwise specifically provided, when used in this Act: . . .

> (11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."

STATEMENT OF FACTS

This matter arises out of a petition for review filed in the United States Court of Appeals for the Third Circuit by Bethlehem seeking review of the action of the Administrator of EPA in issuing an NPDES water discharge permit for Bethlehem's iron and steel manufacturing facilities located in Bethlehem, Pennsylvania. The permit was issued pursuant to Section 402 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 880, 33 U.S.C. §1342.* The Administrator has stipulated that through no fault of its own, Bethlehem cannot meet the compliance date which he has placed in the permit for certain effluent limitations. The text of the stipulation is set forth in Appendix E, p. 30a, infra.

The NPDES permit in question was issued to Bethlehem for its Bethlehem plant on December 31, 1974, following a public hearing held on December 13, 1974. At the hearing Bethlehem proposed a compliance schedule for the completion of 22 projects involved in designing, purchasing and installing facilities required to meet the effluent limitations contained in the permit. The total cost of the project was then estimated at $27 million.** The schedule was in phases and called for completion of Phase I by January 1, 1979 and Phase II by July 1, 1979. The permit which was issued, however, required that final permit conditions be met no later than July 1, 1977. On January 16, 1975, Bethlehem requested an adjudicatory hearing pursuant to 40 C.F.R. §125.36 with regard to the imposition of the July 1, 1977 compliance date. The hearing was granted and on May 29, 1975 the issue of the authority of the Administrator to issue an NPDES permit which required achievement of effluent standards based on best practicable control technology at a date after July 1, 1977 was referred to the General Counsel of EPA for decision in accordance with the procedure set forth in 40 C.F.R. §125.36(m). On July 24, 1975 the General Counsel issued his decision in which he held that the Administrator has no discretion to extend the date for compliance with such effluent limitations beyond July 1, 1977 (Appendix B., p. 18a). On August 21, 1975 the Regional Administrator of Region III of EPA adopted the legal decision of the General Counsel and refused relief to Bethlehem (Appendix C, p. 22a). Bethlehem filed a timely request for review by the Administrator in accordance with 40 C.F.R. §125.36(n). On September 30, 1975 the Administrator affirmed the decision of the Regional Administrator (Appendix D, p. 25a). On December 29, 1975 Bethlehem filed its petition for review of the decision of the Administrator in the United States Court of Appeals for the Third Circuit. On November 1, 1976 the Court of Appeals issued its decision, to which this petition is directed, affirming the decision of the Administrator (Appendix A, p. 1a).

As noted, Bethlehem's permit was not issued until December 31, 1974. The FWPCA provided in Section 304(b) that EPA would publish regulations setting forth guidelines for effluent limitations which would include a specification of factors for use in determining the best measures for compliance with Section 301(b) of the FWPCA. EPA divided the steel industry into two

---

*Hereinafter the Federal Water Pollution Control Act as amended by the Federal Water Pollution Control Act Amendments of 1972, will be referred to as "the FWPCA".

**At the present time the total cost of the project is estimated at $40 million.

segments or phases for the purpose of promulgating guidelines. Phase I included the facilities involved in basic iron and steel production. Phase II included steel finishing operations. Both Phase I and Phase II facilities are included in the Bethlehem plant.* At the time the permit in question was issued to Bethlehem, EPA had not yet promulgated guidelines defining best practicable control technology for Phase II of the Iron and Steel Manufacturing Point Source Category. Although guidelines had been promulgated defining best practicable control technology for Phase I of the Iron and Steel Manufacturing Point Source Category on June 28, 1974, they were the subject of a pending appeal to the United States Court of Appeals for the Third Circuit and ultimately were set aside and remanded in an opinion reported as *American Iron and Steel Institute v. EPA,* 526 F.2d 1027 (3rd Cir. 1975). Thus the limits which Bethlehem is required to meet at the Bethlehem plant were not established until December 31, 1974 in accordance with the terms and conditions of the permit in question.

Despite the fact that Bethlehem had consistently indicated that it could not complete the installation of the facilities contemplated by the permit until July 1, 1979, the permit required completion by July 1, 1977. The parties have entered into a stipulation, attached as Appendix E, which confirms that Bethlehem had begun designing its control facilities during the pendency of its permit application and that Bethlehem diligently proceeded with the completion of final plans and the

*There is no relationship between EPA's Phase I and Phase II guidelines and Phase I and Phase II of Bethlehem's control plan referred to at p. 4, supra. The use of the same term is purely coincidental.

initiation of construction during the pendency of its administrative appeals. The stipulation states in paragraph 9 that:

> "9. Petitioner began designing the projected pollution control facilities for the Bethlehem plant during the pendency of its permit application, based upon its expectations regarding the final limitations which EPA would impose. Petitioner has diligently proceeded with the completion of final plans and the initial stages of construction despite the pendency of its appeal of the permit as issued. No delay in implementation of petitioner's plans has been occasioned by petitioner's reluctance to proceed."

The stipulation of the parties in this case also establishes that Bethlehem is in fact installing technology which is, or is the equivalent to, best practicable control technology currently available. It establishes that the installation will not be complete before July 1, 1979 and that it is through no fault on the part of Bethlehem that the technology cannot be installed by July 1, 1977. Paragraph 10 of the stipulation provides:

> "10. Petitioner has prepared a detailed engineering and construction analysis of the time requirements for installation of the necessary pollution control equipment. (See Attachment A.) Respondent has reviewed this information, and the parties are in agreement that Petitioner cannot physically complete all necessary facilities prior to July 1, 1977. The earliest feasible date for completion of the facilities appears to be July 1, 1979."*

*Attachment A has not been reproduced as a part of Appendix E.

REASONS FOR GRANTING THE WRIT

The Agency and the Court below have construed the FWPCA erroneously in a manner which works a substantial injustice upon Bethlehem and others similarly situated. The parties have stipulated that it is through no fault on the part of Bethlehem that it cannot accomplish the task of installing the equipment necessary to meet the effluent limits contained in its NPDES discharge permit by July 1, 1977. Despite this the July 1, 1977 compliance date has been imposed upon Bethlehem. This administrative act exposes Bethlehem to substantial penalties. Section 309(c)(1) of the FWPCA, as amended, 86 Stat. 859, 33 U.S.C. §1319 (c)(1), provides that:

> "Any person who willfully or negligently violates . . . any permit condition . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year or by both."

Section 309(c)(3) of the FWPCA, as amended, 86 Stat. 859, 33 U.S.C. §1319(c)(3), provides that:

> "For the purposes of this subsection, the term 'person' shall mean, in addition to the definition contained in Section 502(5) of this Act, any responsible corporate officer."

Section 309(d) of the FWPCA, as amended, 86 Stat. 859, 33 U.S.C. §1319(d), provides that:

> "Any person who violates . . . any permit condition . . . and any person who violates any order issued by the Administrator under subsection (a) . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation."

Finally Section 505 of the FWPCA, as amended, 86 Stat. 888, 33 U.S.C. §1365, provides for citizens' suits to enforce permit conditions or force the imposition of civil penalties provided by the FWPCA. The risk to one in the position of Bethlehem is great. Under the terms of the present permit Bethlehem faces exposure to cumulative penalties in excess of $25 million on the conservative assumption that the failure to meet all permit limits by July 1, 1977 results in only one permit violation each day. If each discharge point or each effluent limitation is regarded as the subject of a separate violation, the exposure is much greater.

In addition, Bethlehem does not represent an isolated case. The same problem faces municipal treatment authorities as shown by *State Water Control Board v. Train,* ..... F. Supp. ....., 8 ERC 1609 (E.D. Va. 1976), appeal pending. Similar issues are posed in *Republic Steel Corp. v. Train, et al.,* currently pending before the United States Court of Appeals for the Sixth Circuit at Docket No. 76-1557.

The severity of the problem is evidenced by the fact that EPA developed a procedure known as the "Enforcement Compliance Schedule Letter" ("ECSL") in an attempt to deal with it. BNA Environment Reporter, Current Developments Section, Vol. 7, No. 6, p. 241 (June 11, 1976). However, as recognized by the Court below, this procedure is by its terms inapplicable to Bethlehem which has completed the administrative review process. The ECSL is also inadequate to provide a complete solution to the problem raised by the Administrator's interpretation that the FWPCA bars a permit allowing the completion of installation of best practicable control technology after July 1, 1977. It is inadequate be-

cause it provides no protection against citizens' suits pursuant to Section 505 of the FWPCA, as amended, 86 Stat. 888, 33 U.S.C. §1365, and because it is an exercise of prosecutorial discretion which may not be binding on the Agency. Moreover, the fact that under the announced ECSL policy even the most trivial violation of a permit condition acts to void the ECSL makes it of little practical value.

Bethlehem submits that EPA's interpretation is not consistent with the intent of Congress or the language of the FWPCA.

It was not the purpose of the FWPCA to require industry to cease operation. In the Senate debate on the 1972 Amendments, Senator Jennings Randolph, Chairman of the Senate Committee on Public Works and a member of the Conference Committee observed:

> "The committee does not want to impose impossible goals, nor does it intend to require expenditures so execessive that they would undermine our economy. Consequently, under the proposed legislation, controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred." 117 Cong. Rec. 38805 (1971), Environmental Policy Division of the Library of Congress, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93 Cong., 1st Sess., (Cong. Print 1973) p. 1272.

Unlike the Clean Air Act which rejected consideration of technical and economic feasibility, *Union Electric Co. v. EPA*, ... U.S. ....., 49 L. Ed. 2d 474, 96 S. Ct. 2518 (1976), the FWPCA expressly contemplates that consideration of technical and economic feasibility will

be taken into account, *e.g.*, Section 304(b), as amended, 86 Stat. 850, 33 U.S.C. §1314(b). Thus there is no justification for construing the FWPCA to require the accomplishment of impossible tasks.

Moreover, the express language of the FWPCA contains the authority for EPA to impose a schedule of compliance in a permit which requires the completion of the installation of best practicable control technology currently available on a date *after* July 1, 1977. Section 301(b)(1)(A) of the FWPCA, as amended, 86 Stat. 844, 33 U.S.C. §1311(b)(1)(A), requires a point source to achieve not later than July 1, 1977 *effluent limitations* which shall require the application of best practicable control technology currently available. Effluent limitation is a defined term under the FWPCA. Section 502(11) of the FWPCA, as amended, 86 Stat. 886, 33 U.S.C. §1362, defines effluent limitation as:

> ". . . any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone or the ocean, *including schedules of compliance.*"

Thus the requirement of Section 301 can be met if, on July 1, 1977, a source is on an approved and enforceable schedule of compliance which will require the completion of installation of best practicable control technology as expeditiously as practicable. This realistic interpretation of the FWPCA is available to resolve the apparent dilemma created by the General Counsel's construction of the FWPCA but it was ignored by the Court below.

This construction of the FWPCA also avoids the serious constitutional problem raised by the rulings below. Bethlehem urges that the failure of the Agency to adopt a liberal and reasonable interpretation of the FWPCA is an arbitrary and capricious action and a taking of property without the due process of law guaranteed by the Fifth Amendment. The construction of the FWPCA by the Agency exposes Bethlehem to the harsh penalties of the FWPCA because of its failure to complete a task which the Agency has stipulated cannot be done. Congress cannot be considered to have enacted legislation which holds out a false promise of adequate time for compliance with its demands but in fact imposes the alternatives of harsh penalties or termination of operation on those who have exerted the utmost effort to meet an unattainable deadline. This conclusion is especially compelling in the present circumstances where a reasonable interpretation of the FWPCA is available to avoid such a result. This Court should rectify the situation in which Bethlehem finds itself.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

John McN. Cramer
Reed Smith Shaw & McClay

Counsel for Petitioner
Bethlehem Steel Corporation

Dated: January 28, 1977

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 75-2452

BETHLEHEM STEEL CORPORATION,
Petitioner

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF
THE ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Petition for Review of the Order of the Administrator of the Environmental Protection Agency Dated September 30, 1975.

Argued September 8, 1976

Before: ADAMS, ROSENN and GARTH, *Circuit Judges.*

JOHN MCN. CRAMER
Reed Smith Shaw & McClay
Pittsburgh, Penna.

Attorneys for Petitoner

PETER R. TAFT,
Asst. Attorney General

ALFRED T. GHIORZI,
THOMAS A. PURSLEY III,

Attorneys, Dept. of Justice
Washington, D.C.

ROBERT V. ZENER,
General Counsel

Appendix A.

BARRY L. MALTER

Attorney, EPA,
Washington, D.C.

JOHN BUFFINGTON,

Attorney, EPA
Philadelphia, Pa.

Attorneys for Respondent

EBEN H. COCKLEY
RONALD R. JANKE
JONES, DAY, REAVIS & POGUE
Cleveland, Ohio

Of Counsel:

JAMES D. DONOHOE

Attorneys for Amicus Curiae
Republic Steel Corporation

OPINION OF THE COURT
(Filed November 1, 1976)

ADAMS, *Circuit Judge.*

This case involves an important question regarding the interpretation of the Federal Water Pollution Control Act (FWPCA).[1] We must determine whether the Environmental Protection Agency (EPA) may issue a permit which would allow dischargers to comply with effluent limitations at a time subsequent to July 1, 1977, the date set forth in the act.

---

1. 33 U.S.C. §§1251 *et seq.* (Supp. III 1973).

Appendix A.

I.

FWPCA encompasses a complex statutory scheme that seeks "to restore and maintain the chemical, physical and biological integrity of the nation's waters" in order to achieve a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."[2]

Three interrelated provisions form the heart of the program and are the focus of this litigation. Section 301(b)[3] establishes two stages of effluent limitations. The stage relevant to our present inquiry is the requirement of conformity by July 1, 1977 with "effluent limitations for point sources . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act . . . ." The second provision, section 304(b)(1)(A),[4] in turn requires the EPA to promulgate guidelines for emissions by certain industries, including the iron and steel industry, by October 18, 1973. The third provision, section 402,[5] establishes the National Pollutant Discharge Elimination System (NPDES) permits as the primary means through which effluent limitations are to be enforced. All discharges of pollutants must be authorized by a permit issued by

---

2. *Id.* §1251(a). We are providing only a thumbnail sketch of FWPCA. For more complete descriptions, *see* American Iron & Steel Institute v. EPA, 526 F.2d 1027, 1035-42 (3d Cir. 1975); National Resources Defense Council, Inc. v. Train, 510 F.2d 692, 695-98 (D.C. Cir. 1975).

3. 33 U.S.C. §1311(b) (Supp. III 1973).

4. *Id.* §1314(b)(1)(A).

5. *Id.* §1342.

either the EPA or the state environmental authorities. Subsection (a)(1) of section 402[6] states that the permits are to be conditioned on conformity with all applicable requirements of certain other statutory provisions, including section 301. It is further provided that all permits must be issued by December 31, 1974.[7]

Thus, the legislative structure appears to be that the general standards of pollution control are to be promulgated under sections 301 and 304, and that these standards are then to be implemented in particular cases through the use of section 402 permits.

The sequence of administrative action contemplated by Congress has never taken hold in the iron and steel industry. The section 304 guidelines for that industry were not established by October 18, 1973; indeed, none are in force today.[8] As a result, permits have been issued to iron and steel manufacturers under a clause of section 402(a)(1) that empowers the EPA to grant permits, on

---

6. *Id.* §1342(a)(1).

7. *Id.* §1342(k).

8. In Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975), the United States Court of Appeals for the District of Columbia Circuit ruled that EPA was under a statutory obligation to promulgate guidelines for 27 enumerated industries, including iron and steel, and ordered EPA to issue these guidelines as expeditiously as possible. Indeed, it should be noted that EPA conceded that this was its responsibility. *See id.* at 704. EPA did issue Phase I guidelines for the iron and steel industry. However, they were set aside by this Court in American Iron and Steel Institute v. EPA, 526 F.2d 1027 (3d Cir. 1975). To this date, EPA has not published revised Phase I guidelines.

an interim basis, before formal guidelines are promulgated.[9]

II.

On December 31, 1974, the EPA issued a permit to Bethlehem, pursuant to its stopgap authority, containing effluent limitations and compliance schedules, and requiring attainment of final compliance levels by July 1, 1977.[10] For Bethlehem to meet this deadline it would have to complete extensive construction by April 1, 1977, something which Bethlehem has insisted is physically impossible in spite of good faith compliance efforts.[11] The earliest date by which it could meet the prescribed levels would by July 1, 1979.[12] Bethlehem fully pursued its administrative remedies in an attempt to win an extension of the compliance date. Although EPA agreed that compliance by July 1, 1977 was not feasible, it ruled at all stages that it was without power under FWPCA to grant an extension.[13]

A significant development has occurred subsequent to the filing of the petition for review in the present case, that bears heavily on the resolution of this proceed-

---

9. Section 402(a)(1) of FWPCA, 33 U.S.C. §1342(a)(1) (Supp. III 1973) authorizes the Administrator to issue permits "prior to the taking of necessary implementing actions." In such cases, the permits are premised upon adherence to "such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."

10. *See* NPDES Permit Number PA 0011177.

11. *See* Stipulation of the Parties ¶¶ 8-10, App. at 70a-71a.

12. *See id.* at 71a.

13. These facts have been stipulated to by EPA and Bethlehem. *See* App. at 69a-71a.

ing. On June 3, 1976, EPA circulated a memorandum which stated that, in certain instances, it would not undertake enforcement actions against dischargers for failure to meet the July 1, 1977 deadline.[14] Recognizing that some industrial dischargers would be unable to conform, despite good faith efforts, the agency announced that if a discharger did not have a final permit, EPA would issue an Enforcement Compliance Schedule Letter (ECSL). The ECSL would specify a program requiring final Stage I effluent limitation levels at some time after July 1, 1977. EPA was careful to note, however, that the permit issued to recipients of an ECSL would contain the July 1, 1977 compliance date. EPA has continued to insist that it is without statutory power to alter the deadline. Rather, the EPA urges that the ECSL program is merely an exercise of its prosecutorial discretion.

In a letter commenting on the impact of the ECSL scheme on the present action, and at oral argument, EPA stated that Bethlehem, having already received a final permit, is not eligible for an ECSL. However, EPA informed us that its stipulation with Bethlehem has the same effect as an ECSL and that enforcement action was, perforce, highly unlikely.

This Court has jurisdiction pursuant to section 509 (b) (1) of FWPCA,[15] which provides for review in the courts of appeals of action by the Administrator of EPA

---

14. *See* 7 BNA Environmental Law Reporter 241-42. (June 11, 1976).

15. 33 U.S.C. §1369(b) (1) (F) (Supp. III 1973).

"in issuing or denying any permit under section 402."[16] After scrutinizing the contentions of the parties, we have decided that the petition for review must be dismissed.

III.

As the first step in our analysis, we must explore the problem whether this case has become moot. As noted, EPA has told the Court that, because of the stipulation between the parties, it does not contemplate bringing enforcement action against Bethlehem when the projected failure to comply with the July 1, 1977 deadline comes to pass. Since the stipulation, however, does not obviate all the adverse consequences that might be visited upon Bethlehem because of its inability to conform to the deadline date, we conclude that a live case or controversy still exists.[17]

Two considerations shape our determination. Although EPA made clear that it had no intention to bring either a civil or a criminal action against Bethlehem, it conceded that it could not foreclose that possibility in the future. A more significant factor affecting the question of mootness, however, is the provision in section 505 of FWPCA[18] for citizen suits against dischargers which fail to comply with the terms of the permit. While a citizen must give the EPA advance notice of his in-

---

16. Although the EPA granted Bethlehem a permit in this case, Bethlehem contends that one of the conditions in the permit is premised on an erroneous interpretation of FWPCA. Thus, Bethlehem seeks review of action taken in issuing a permit.

17. *See* Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

18. *Id.* § 1365.

tention to sue,[19] there is no authorization to block a citizen's suit under section 505 even though the agency believes that the suit should not go forward. Thus, the EPA-Bethlehem stipulation would not foreclose the possibility that a citizen could proceed with litigation seeking the imposition of sanctions because of Bethlehem's inability to comply with the statutory deadline. Accordingly, this case cannot be deemed moot and we must proceed to the merits.

IV.

At the core of Bethlehem's argument on appeal is its contention that, in spite of the legislation's explicit provision of the July 1, 1977 deadline, Congress could not possibly have intended to subject corporations to sanctions for failing to comply with time limits that proved to be unattainable. In such circumstances, it continues, Congress surely would intend for EPA to have the discretion to grant extensions to companies which were undertaking good faith compliance efforts.[20]

---

19. 33 U.S.C. § 1365(b) provides that no citizen's suit may be filed unless the putative plaintiff has given the administrator at least 60 days' notice of his intention to sue.

20. In a similar vein, Republic Steel Corporation, as amicus, argues that the EPA's failure to issue guidelines for the iron and steel industry pursuant to the statutory mandate, *see* note 8 *supra,* is another factor that should lead us to hold that July 1, 1977 is not an absolutely rigid deadline. Republic maintains that by requiring that all guidelines be promulgated by October 18, 1973, and all permits issued by December 31, 1974, Congress indicated that dischargers were to be granted a minimum amount of "lead time" for planning and executing compliance strategies. EPA's tardiness, Republic asserts, thus entitles it to a reprieve from the July 1, 1977 deadline. It should be mentioned, however, that Bethlehem did receive its permit on December 31, 1974, the last day of the allowable period for permit issuance. Bethlehem has also brought EPA's delay in promulgating guidelines to our attention, urging that it buttresses its assertion that Congress wrote many unrealistic compliance dates into FWPCA. It also submits that when EPA's action was challenged, the courts granted the agency a measure of relief. *See* Reply Brief at 6. We note, however, that the D. C. Circuit, in *National Resources Defense Council, see* note 8 supra, ruled that EPA's failure to issue iron and steel guidelines pursuant to the Congressional timetable was improper.

Bethlehem has not based its assertions on the text of the statute. Instead, in support of its position, it has directed our attention to several aspects of the legislative history. It states that the Phase I compliance date in early drafts of the legislation was July 1, 1976, and that for Phase II, July 1, 1981. Congress, however, pushed "these dates forward because of the time consumed in completing Congressional action."[21] Bethlehem insists that this amendment manifests a Congressional concern for the need of industry to have adequate time to plan and consummate compliance activity. It further maintains that this sensitivity should be interpreted as permitting the Administrator to bend the July 1, 1977 requirement when dischargers cannot meet that date through no fault of their own.

Bethlehem also asserts that the legislative history contains many statements indicating that Congress was

---

21. *See* Environmental Policy Division of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st Sess., (Comm. Print 1973) at 237. [Hereinafter cited as Legis. Hist.]

attentive to the social and economic ramifications of the standards to be established under 301, 302 and 304 of FWPCA. In particular, it stresses the observations of Senator Randolph, a member of the Senate-House Conference Committee.[22]

> "The Committee does not want to impose impossible goals, nor does it intend to require expenditures so excessive that they would undermine our economy. Consequently, under the proposed legislation, controls must relate the economic and social benefits to be gained with the economic and social costs to be incurred."

The draconian consequences of EPA's strict insistence on the July 1, 1977 deadline, Bethlehem submits, is inconsistent with Congressional awareness of the unwelcome economic impact of the overly zealous pursuit of environmental goals.

Although we are sympathetic to the plight of Bethlehem and similarly situated dischargers, examination of the terms of the statute, and of the legislative history of FWPCA and the case law has convinced us that July 1, 1977 was intended by Congress to be a rigid guidepost. The portions of the legislative history cited by Bethlehem speak to the economic and social consequences of the *substance* of guidelines established under sections 301, 302 and 304. Indeed, section 304(b)(2)(B) explicitly mandates that the Administrator is to consider social and economic costs in the context of

---

22. *Id.* at 1272. *See also id.* at 350 (remarks of Representative Blatnik; *id.* at 244, 352 (remarks of Representative Harsha).

assessing the best practicable control technology available.[23]

There are no comparable expressions of concern with the economic consequences of the July 1, 1977 date. Instead, all discussion of this date in the legislative history indicates that Congress viewed it as an inflexible target. The most important statement on the significance of the July 1, 1977 deadline was made by Senator Muskie, the principal author of FWPCA:[24]

> This does not mean that the Administrator cannot require compliance by an earlier date; it means that these limitations must be achieved no later than July 1, 1977, that they must be uniform and that they will be final upon the issuance of a permit under section 402 of the bill.

This view was echoed by Representative Jones, a member of the Senate-House Conference Committee:[25]

> It is the intention of the managers that the July 1, 1977 requirements be met by phased compliance and that all point sources will be in full compliance no later than July 1, 1977.

The import of these statements is reinforced by a further portion of the legislative history. H.R. 11896, the House version of the bill that ultimately became

---

23. *See* 33 U.S.C. § 1314(b)(i)(B) (Supp. III 1973) (stating that Administrator shall consider, *inter alia*, "total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application."

24. *See* Legis. Hist. at 162.

25. *See* id. at 231. *See also id.* at 1278 (remarks of Senator Bentsen).

FWPCA, contained a provision authorizing EPA to extend the compliance deadline in cases where there was a showing of hardship upon the discharger.[26] The Senate bill, however, contained no comparable clause. When the final version of the legislation emerged from the Conference Committee, it provided no authority for extension of the deadline for any reason whatsoever, and FWPCA as enacted also lacks such a mandate. The failure of a conference committee to include a portion of a bill proposed in one House is not a conclusive in-

26. Section 301(b)(3) of H.R. 11896 provided:

> The Administrator may extend for any point source the dates prescribed in subparagraphs (A) and (B) of paragraph (1) of this Subsection. No extension or extensions of such date shall exceed a total of two years from the date prescribed in such subparagraph. Public hearings must be held by the Administrator in connection with any such extension prior to granting such extension. No extension shall be granted unless the Administrator determines that it is not possible either physically or legally to complete the necessary construction within the statutory time limit.

Administration officials strongly supported the inclusion of such authority. Russell E. Train, then Chairman of the Council on Environmental Quality, stated that:

> It is our view that a 1976 [later amended to 1977] deadline toward achieving best practicable treatment is a reasonable deadline, and the extension we suggest of 2 years is simply designed to recognize that there can be hardship cases that will exist at the termination of that period of time.

Legis. Hist. at 1175.

dicium of legislative intent.[27] But here, in light of the other segments of the legislative history, it leads to the conclusion that Congress did not authorize the EPA to deviate from the July 1, 1977 deadline for attainment of Phase I compliance levels.

We are aware that our interpretation of FWPCA may work a hardship on Bethlehem, which is doing everything within its powers to achieve the required levels of effluent limitation as expeditiously as possible. However, the cases in general, and in the environmental field in particular, teach that the appropriate body from which to seek relief in situations such as the present one is the Congress.[28] Two recent decisions interpreting ecology statutes will illustrate this proposition.

The Supreme Court examined a comparable problem in Union Electric Co. v. EPA,[29] a case which arose under the Clean Air Act. In *Union Electric,* the Court held that the EPA may not reject a state implementation plan on the grounds of economic and technological

27. *See* Gemsco, Inc. v. Walling, 324 U.S. 244, 264-65. *But cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.")

28. *See, e.g.,* In re I. J. Knight Realty Corp., 501 F.2d 62, 67 (3d Cir. 1974); Mathey v. United States, 491 F.2d 481, 487 (3d Cir. 1974).

29. 44 U.S.L.W. 5060 (1976).

infeasibility.[30] The Court acknowledged that harsh consequences could ensue under such an interpretation, but stated that this was a risk that Congress had opted to take, and that it was not for the Courts to upset that Congressional decision.[31] *Union Electric* appears to indicate that the Supreme Court is willing to construe environmental statutes in a manner that may impose major burdens on polluters, and if the plain language of the applicable legislation so indicates, relief from such hardships must flow from Congress.[32]

The decision in State Water Control Board v. Train,[33] reflects an approach similar to that taken in *Union Electric* in the context of a factual situation closely resembling the one in this case. Section 301(b)(1) of FWPCA[34] requires that publicly-owned sewage treatment plants must comply with certain effluent limitations by July 1, 1977. The Act[35] states that the federal government will provide 75% of all funding required for construction of municipal treatment facilities. For a variety of reasons much of the funding was not made available to local governments. This resulted in many

30. *Id.* at 5065.

31. *Id.* at 5066. *See also id.* at 5067 (Powell, J., concurring).

32. *See also* City of Santa Rosa v. EPA, 534 F.2d 150 (9th Cir. 1976), where the Ninth Circuit upheld EPA gas rationing regulations in spite of the severe economic and social displacement that would be imposed upon certain areas of California. The Court expressed serious concern about the consequences of the regulations, but stated that any ameliorative action would have to come from Congress. *Id.* at 155.

33. 8 E.R.C. 1609 (E.D. Va. 1976).

34. 33 U.S.C. § 1311(b)(1) (Supp. III 1973).

35. *Id.* § 1282.

publicly-owned treatment plants being unable to meet the July 1, 1977 deadline. The Virginia State Water Control Board brought suit for a judgment declaring that the affected sewage treatment plants did not have to meet the compliance date. The Board urged that Congress must have intended to link compliance with the deadline to the availability of the federal funds.

Judge Mehrige's opinion expressed sympathy for the predicament in which the municipalities had been placed by the federal government's failure to meet its statutory responsibility. But he ruled that there was no warrant in the legislation for granting an extension of the compliance date.[36] The proper organ of government to extricate the local governments from their difficulties, Judge Mehrige stated, was not the courts, but Congress.

Accordingly, on the basis of the legislative history and the adjudicated cases, we hold that the EPA is without authority to grant an extension, in NPDES permits, of the July 1, 1977 date.[37]

36. 8 E.R.C. at 1612, 1616, 1617.

37. The final report of the National Commission on Water Quality specifically recommends that *the Congress* authorize extensions of the July 1, 1977 deadline in appropriate cases. *Report to the Congress by the National Commission on Water Quality,* March 18, 1976, at 15.

V.

Bethlehem has also asserted that if FWPCA is construed to require compliance by July 1, 1977, the Act, then, deprives it of the due process of law guaranteed by the fifth amendment. It would appear, however, that the federal government's power over interstate commerce is sufficiently broad to encompass this effort to confront the pressing problem of improving the quality of our nation's waters.

We have examined the other contentions raised by Bethlehem and the amicus and find them to be without merit. The petition for review will therefore be dismissed.
TO THE CLERK:

Kindly file the foregoing opinion.

ARLIN M. ADAMS
Circuit Judge

DATED:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 75-2452

BETHLEHEM STEEL CORPORATION,
Petitioner

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

Present: ADAMS, ROSENN and GARTH, *Circuit Judges*

Judgment

This cause came on to be heard on the certified index to the record from the Administrator of the Environmental Protection Agency and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review be, and the same is hereby dismissed. Costs taxed against the petitioner.

ATTEST:

THOMAS P. QUINN
Clerk

November 1, 1976

Appendix B.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

Decision of the General Counsel on Matters of Law Pursuant to 40 CFR §125.36(m)

No. 26

In the matter of National Pollutant Discharge Elimination System for Bethlehem Steel Corporation, Bethlehem, Pennsylvania (PA 0011177), the Presiding Officer has certified one issue of law to the General Counsel for decision pursuant to 40 CFR §125.36(m) (39 FR 27078, July 24, 1974). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issue:

ISSUE OF LAW NO. I

Question Presented

"May the Environmental Protection Agency establish an effective date for final permit conditions later than July 1, 1977, where final permit conditions are based upon the best practicable control technology currently available and on water quality standards?"

Conclusion

Section 301, subsections (b)(1)(A) and (b)(1)(C) of the Federal Water Pollution Control Act, as amended (the "Act"), while representing an interim step in the achievement of the goals of the Act set forth in section 101, clearly requires the achievement, by July 1, 1977, of effluent reductions based on the more stringent requirements of either section 301(b)(1)(A) or section 301(b)(1)(C) of the Act. The Administrator has no discretion to extend the date of compliance.

Appendix B.

Discussion

The applicant urges that the requirements of section 301(b)(1)(A) and (C) are merely interim steps in achieving the ultimate goals of the Act set forth in section 101, and that in view of the Administrator's delay in the implementation of certain provisions of the Act[1], the "Act does not arbitrarily establish July 1, 1977 as the compliance date for all sources or the Act is an unconstitutional deprivation of due process." (Brief of Bethlehem Steel, page 8). The applicant does not state which conditions in its permit derive from effluent regulations promulgated pursuant to sections 301 and 304, which from water quality or other considerations of 301(b)(1)(C), or which have been derived *ad hoc* pursuant to section 402(a)(1).

The gravamen of the applicant's complaint here is that due to administrative delays, it will be unable to achieve the effluent reductions required by section 301, as implemented in the permit, by July 1, 1977 and that it should therefore be permitted to achieve the required effluent reductions in 1978 or 1979. I cannot agree with this conclusion.

First, the Agency has promulgated effluent regulations applicable to a portion of the applicant's discharge. 40 CFR §420.40 *et seq.*[2] These regulations set

---

1. The delay alluded to concerns the promulgation of the "Phase II" effluent regulations for the Iron & Steel Manufacturing Point source category.

2. The "Phase I" Iron & Steel regulations were promulgated on June 28, 1974 (39 Fed Reg 24114). Applicant has challenged these regulations in the U.S. Court of Appeals for the Third Circuit and has requested that the Court stay their applicability. *Bethlehem Steel Corporation et al v. EPA,* No. 74-1642.

forth, as of the date of their promulgation, a definition of the reductions in discharge which must be achieved by July 1, 1977 in order to constitute the "best practicable control technology." The permit applicant here does not appear to be challenging the promulgated regulation applicable to its discharge but only the date by which it must be met. The regulation, however, merely defines, for particular industrial subcategories what Congress has directed to be achieved by that date. Thus, insofar as this question relates to the achievability of the effluent regulations by July 1, 1977, the argument must be viewed as a challenge to the regulation itself rather than the date by which it is to be achieved. *Getty Oil Company v. Ruckleshaus,* 467 F.2d 349 (3rd Cir. 1972), *cert den.* 93 S. Ct. 937 (1973). We have previously held that this proceeding is not available as a forum to challenge promulgated effluent regulations. See Opinions of the General Counsel Numbers 3 (March 6, 1975) and 23 (July 3, 1975).

With respect to those portions of the permit which may have been derived from requirements imposed pursuant to section 301(b)(1)(C), Opinions of the General Counsel Numbers 13 (May 19, 1975) and 14 (May 21, 1975) conclude that EPA is required to include conditions in its permits requiring compliance with section 301(b)(1)(C) by July 1, 1977.

To the extent portions of the permit neither have been derived from effluent regulations promulgated pursuant to sections 301 and 304 nor required pursuant to section 301(b)(1)(C), Opinions of the General Counsel Numbers 1, (September 5, 1974) and 3 (March 6, 1975), conclude that in issuing permits prior to the promulgation of effluent regulations pursuant to section 304, a

determination of what constitutes best practicable control technology is a factual issue to be resolved in the administrative process pursuant to section 402(a)(1).

Thus, section 301 compels that its substantive requirements be achieved by July 1, 1977. This is the clear language and meaning of the statute. "If the language admits of not more than one meaning, the duty of interpretation does not arise . . ." *Caminetti v. United States,* 242 U.S. 470, 485 (1917). There is, accordingly, no need to refer to the legislative history.

ROBERT V. ZENER
General Counsel

Dated: July 24, 1975

APPENDIX C

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION III

Curtis Building
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

DECISION OF THE REGIONAL ADMINISTRATOR

IN THE MATTER OF: National Pollutant Discharge Elimination System Permit for: Bethlehem Steel Corporation Bethlehem Plant 701 E. Third Street Bethlehem, Pennsylvania 18016	Permit Number: PA 0011177 Docket Number: PA-AH-0058

FINDINGS OF FACT

1. In a letter dated January 16, 1975, and signed by H. F. Miller, General Manager, Bethlehem Plant, Bethlehem Steel Corporation (the "permittee") requested an adjudicatory hearing to consider the terms and conditions of a National Pollutant Discharge Elimination System permit which had been issued on December 31, 1974, to the permittee for a discharge at its Bethlehem plant.

2. The only issue raised by this request for an adjudicatory hearing was:

> May the Environmental Protection Agency establish an effective date for final permit conditions later than July 1, 1977, where final permit conditions are based upon the best practicable control technology currently available and on water quality standards?

3. On May 29, 1975, the question at issue was submitted to the General Counsel of the Environmental Protection Agency for decision, pursuant to 40 CFR §125.36 (m) (3).

4. On July 24, 1975, a decision on the issue of law was issued by Robert V. Zener, General Counsel.

5. No factual or legal question remains to be resolved in this matter.

CONCLUSION OF LAW

The Environmental Protection Agency does not have the statutory authority to establish an effective date for final permit conditions later than July 1, 1977, where final permit conditions are based upon the best practicable control technology currently available and on water quality standards.

Appendix C.

ORDER

1. Insofar as the permittee's letter of January 16, 1975, constitutes a request that the Regional Administrator modify the subject permit, the request is denied.

2. The permittee's request for an adjudicatory hearing is dismissed.

3. The subject permit will take effect as originally issued ten days from the date of this decision, unless the permittee submits a petition for the Administrator's review of this decision within that time period, pursuant to 40 CFR §125.36(m).

Dated: August 15, 1975

DANIEL J. SNYDER, III
Regional Administrator

Appendix D.

APPENDIX D

BEFORE THE ADMINISTRATOR
U. S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C.

IN THE MATTER OF: National Pollutant Discharge Elimination System Permit For Bethlehem, Pennsylvania Plant (Permit No. PA 0011177) Bethlehem Steel Corporation, Permittee.	Docket No. PA-AH-0058

Decision of the Administrator

On September 3, 1975, Bethlehem Steel Corporation ("Permittee") filed a petition for review of a decision issued on August 21, 1975, by the Regional Administrator, Region III in the above-captioned proceeding.

The petition recites that on December 31, 1974, the Regional Administrator, Region III, issued a National Pollutant Discharge Elimination System (NPDES) permit for Permittee's Bethlehem, Pennsylvania plant, following a public hearing held on December 13, 1974. At the hearing, Permittee proposed a compliance schedule for the completion of some 22 projects involved in designing, purchasing and installing facilities required to meet the permit effluent limitations, which called for the completion of Phase I by January 1, 1979, and Phase II by July 1, 1979. The permit issued on December 31, 1974, however, requires that final permit conditions be met no later than July 1, 1977.

On January 16, 1975, Permittee requested an adjudicatory hearing on the following issue:

> "May the Environmental Protection Agency establish an effective date for final permit conditions later than July 1, 1977 where final permit conditions are based upon the best practicable control technology currently available and on water quality standards."

On May 29, 1975, the foregoing question was referred to the General Counsel of EPA as a certified issue of law, pursuant to 40 CFR 125.36(m)(3). The General Counsel concluded, in a decision issued on July 24, 1975, that Section 301 of the Federal Water Pollution Control Act, as amended (the "Act"):

> ". . . clearly requires the achievement, by July 1, 1977, of effluent reductions based on the more stringent requirements of either section 301(b)(1)(A) or 301(b)(1)(C) of the Act. The Administrator has no discretion to extend the date of compliance."

The August 21, 1975, decision of the Regional Administrator, Region III, adopted the conclusion of law decided by the General Counsel and found no factual or legal question remaining to be resolved in this proceeding. Accordingly, permittee's requests to modify the permit and/or convene an adjudicatory hearing were denied. The subject petition for review of the Regional Administrator's decision was filed thereafter within the prescribed 10 day period.

Permittee takes exception to the conclusion of the General Counsel (on the same grounds argued in its brief submitted to the Office of General Counsel in connection with the issuance of the General Counsel's decision) in the following particulars: (1) the General Counsel's decision addresses the "issue" of whether the effluent limitations in the permit were based on effluent guidelines, proposed guidelines, or water quality standards, which Permittee states is not relevant to the issue in controversy, *i.e.,* whether the Administrator may extend the July 1, 1977, compliance date contained in the Act; (2) the General Counsel's decision suggests that Permittee is challenging the effluent guidelines and the dates for compliance set forth therein, rather than the compliance date of July 1, 1977, as set forth in the Act, which they contend is properly reviewable in an adjudicatory hearing since "the compliance date is a condition in the permit as a consequence of the Act and not as a consequence of regulations . . ."; and (3) the General Counsel's decision does not contain an analysis of the legislative history of the Act to determine whether Congress intended that the Administrator have discretion to extend compliance dates for final compliance beyond July 1, 1977. In summary, Permittee contends that the July 1, 1977, compliance date set forth in the Act "is merely an interim date set by Congress for achieving the ultimate objectives and goals by 1983 and 1985," and, as such, may be extended by the Administrator upon a proper showing of inability to comply by that date.

I have examined the language of the Act, as well as its legislative history, and am unable to find any basis to disagree with the conclusion of the General Counsel that, as a matter of law, the Administrator does not have authority or discretion under the Act to extend the July 1, 1977, deadline. The fact that the General Counsel's decision may have addressed other issues which Permittee does not consider relevant to the central issue

raised, does not alter the fact that the central issue—the mandatory July 1, 1977, deadline—also was decided.

That issue being the only matter for which review has been requested by the Permittee, I see no need to prolong this proceeding by requesting additional briefs and argument on possible varying interpretations of the Act which might be offered.

Accordingly, the Decision and Order of the Regional Administrator, Region III, which relied upon the aforementioned decision of the General Counsel, is hereby affirmed and the subject permit, as originally issued, shall take effect immediately with the issuance of this decision.

RUSSELL E. TRAIN

Dated: September 30, 1975

CERTIFICATE

The foregoing is a true and correct copy of a Decision of the Administrator, dated September 30, 1975, deposited in the U.S. Mail, certified mail, at Washington, D.C., addressed to the following:

Daniel J. Snyder, III
Regional Administrator
U.S. Environmental Protection Agency
Region III
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

John V. Buffington, Esq.
Enforcement Division
U.S. Environmental Protection Agency
Region III
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

Brent W. Robbins, Esq.
Law Department
Bethlehem Steel Corporation
Bethlehem, Pennsylvania 18016

H. F. Miller
General Manager
Bethlehem Steel Plant
Bethlehem, Pennsylvania 18016

MICHAEL K. GLENN
Chief Judicial Officer

Dated: October 1, 1975

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Bethlehem Steel Corporation
v.
Russell E. Train, Administrator,
United States Environmental
Protection Agency

Civil No.
75-2452

Factual Stipulation

1. The petitioner, Bethlehem Steel Corporation, has brought this action for review of the decision of the Administrator of the United States Environmental Protection Agency, with regard to the issuance of National Pollutant Discharge Elimination System Permit No. PA 0011177.

2. The respondent, U.S. Environmental Protection Agency, believes the administrative record to be deficient, in that it contains no findings by the Agency as to the following:

a) Whether petitioner is in fact installing pollution control equipment utilizing the best practicable control technology currently available;

b) Whether petitioner is installing such equipment as expeditiously as possible;

c) Whether petitioner can be expected to complete the installation of such equipment by July 1, 1977, as required by NPDES Permit Number PA 0011177; and

d) If petitioner cannot, in fact, complete the required facilities by July 1, 1977, whether any of the delay is the result of negligence or willful delays on the part of the petitioner.

3. In order to clarify the record on these factual matters, respondent has carefully reviewed petitioner's planned pollution control equipment, information prepared by petitioner regarding the various steps required for the installation of the equipment and the time required for each step, and the history of petitioner's efforts to comply with the Federal Water Pollution Control Act from the date of passage of the 1972 Amendments to the date of this stipulation. This stipulation has been prepared for the purpose of eliminating possible factual issues.

4. No final Effluent Limitation Guidelines have been issued for Phase II of the Steel industry. The final effluent limitations included in the permit reflect Phase I Guidelines (40 CFR §420.10 *et seq.*, 39 Fed. Reg. 24114), which have been remanded to EPA for further consideration (American Iron and Steel Institute, et al v. EPA, No. 74-1640, 3d Cir., Nov. 7, 1975), for those parts of the permit covered by the Guidelines. For those parts of the permit not covered by the Guidelines, the permit reflects the best engineering judgment of the staff of the Environmental Protection Agency regarding the levels of treatment achievable utilizing the best practicable control technology currently available for those parts of the Bethlehem plant not covered by Phase I Guidelines.

5. Petitioner has already completed installation of, and has in operation, (1) a bio-oxidation treatment

facility and final cooler recirculation facility, on coke oven waste waters and (2) recirculated blast furnace waste water treatment facilities, which represent the best practicable control technology currently available. In addition, Petitioner has completed installation of various secondary scale pits and other clarification devices on mills' wastewaters.

6. Petitioner is in the process of installing an ammonia distillation system for coke oven wastes, which is designed to achieve compliance with effluent limitations specified in Phase I steel industry Guidelines. This is the only equipment remaining to be completed for those parts of the plant covered by Phase I Guidelines. Accordingly, for those parts of the plant covered by Phase I Guidelines, petitioner has installed or is installing pollution control equipment utilizing the best practicable control technology currently available, or the equivalent in terms of pollutant reduction. (See Attachment A.)

7. Petitioner's plans for treatment of the effluent from processes in the Bethlehem plant which are not covered by Phase I Guidelines are as follows: the effluents from all scale pits in the plant for which additional treatment is required will be combined and pumped to deep bed filtration units which are to be constructed. The filtered water will then be either discharged or returned to the existing pump house for re-use in the plant.

8. Petitioner and respondent agree that the treatment plan outlined in paragraph 7 constitutes the best practicable control technology currently available for the effluent from waste sources at the Bethlehem Plant which will be covered by Phase II Guidelines.

9. Petitioner began designing the projected pollution control facilities for the Bethlehem plant during the pendency of its permit application, based upon its expectations regarding the final limitations which EPA would impose. Petitioner has diligently proceeded with the completion of final plans and the initial stages of construction despite the pendency of its appeal of the permit as issued. No delay in implementation of petitioner's plans has been occasioned by petitioner's reluctance to proceed.

10. Petitioner has prepared a detailed engineering and construction analysis of the time requirements for installation of the necessary pollution control equipment. (See Attachment A.) Respondent has reviewed this information, and the parties are in agreement that Petitioner cannot physically complete all necessary facilities prior to July 1, 1977. The earliest feasible date for completion of the facilities appears to be July 1, 1979.

Appendix E.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals.
Dated: February 23, 1976

BETHLEHEM STEEL CORPORATION,
Petitioner

By John McN. Cramer,
Esquire
Reed, Smith, Shaw & McClay
Union Trust Building
Pittsburgh, Pennsylvania 15230

Attorney for Petitioner

UNITED STATES OF AMERICA, Respondent

By Thomas Pursley,
Esquire
United States Department of Justice
Washington, D. C. 20530

Ray McDevitt, Esquire
United States Environmental Protection Agency
401 M Street, S.W.
Washington, D. C. 20460

John V. Buffington,
Esquire
United States Environmental Protection Agency
Region III
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

Attorneys for Respondent

Supreme Court, U. S.
FILED
MAR 31 1977
MICHAEL RODAK, JR., CLERK

No. 76-1035

In the Supreme Court of the United States

OCTOBER TERM, 1976

BETHLEHEM STEEL CORPORATION, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

ALFRED T. GHIORZI,
THOMAS A. PURSLEY, III,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1035

BETHLEHEM STEEL CORPORATION, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 544 F. 2d 657.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1976 (Pet. App. 17). The petition for a writ of certiorari was filed on January 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Administrator of the Environmental Protection Agency is precluded under the Federal Water Pollution Control Act Amendments from issuing permits

extending beyond July 1, 1977, the date by which point sources are required to limit effluent discharges, using the best practicable control technology currently available.

STATEMENT

On December 31, 1974, the Environmental Protection Agency (EPA), Region III, issued a National Pollutant Discharge Elimination System (NPDES) permit to Bethlehem Steel Corporation. The permit was issued pursuant to Section 402 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA Amendments), 86 Stat. 880, 33 U.S.C. (Supp.V) 1342, and set forth effluent limitations and compliance schedules for Bethlehem's iron and steel manufacturing facility in Bethlehem, Pennsylvania. The permit required Bethlehem, *inter alia*, to achieve certain effluent limitations, based upon the Administrator's view of the best practicable control technology currently available, by July 1, 1977 (see Pet. 4; Pet. App. 5a).

Although Bethlehem agreed with EPA's determination of the effluent limitations that could be achieved using the best practicable control technology currently available, it claimed that it would not be able to comply with those limitations by July 1, 1977. Bethlehem pursued a series of administrative appeals within EPA, seeking an extension of the July 1, 1977, compliance date (see Pet. 4-5). On September 30, 1975, the Administrator of EPA ruled that both the language of the FWPCA Amendments and the pertinent legislative history precluded the agency from extending the July 1, 1977, deadline in an NPDES permit (Pet. App. 25a-28a).

On December 29, 1975, Bethlehem filed a petition for review of the Administrator's decision with the United

States Court of Appeals for the Third Circuit (see Pet. 5). The parties thereafter entered into a factual stipulation acknowledging that Bethlehem had begun to install in its facility in Bethlehem, Pennsylvania, the best practicable control technology currently available—as required by Bethlehem's NPDES permit and Section 301 of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1311. The stipulation also acknowledged that, despite good faith efforts, Bethlehem could not complete installation of the technology contemplated by its NPDES permit before July 1, 1979, and therefore could not achieve the effluent limitations prescribed for July 1, 1977 (Pet. App. 30a-33a).

After having reviewed the terms and legislative history of the FWPCA Amendments, the court of appeals held that EPA was without authority to grant an extension of the July 1, 1977, compliance date. It also rejected the contention that, as so construed, the FWPCA Amendments deprives Bethlehem of the due process of law guaranteed by the Fifth Amendment (Pet. App. 1a-16a). The court therefore dismissed Bethlehem's petition for review (*id.* at 17a).

ARGUMENT

Section 301(b) of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1311(b), provides in pertinent part that "[i]n order to carry out the objective of this Act there shall be achieved * * * not later than July 1, 1977, effluent limitations for point sources * * * which shall require the application of the best practicable control technology currently available * * *." This provision imposes a mandatory, uniform deadline on the achievement of effluent limitations based upon use of the best practicable control technology currently

available. The vehicle chosen by Congress for application of such limitations in individual cases is the NPDES permit program, established pursuant to Section 402 of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1342. Neither Section 402, nor any other provision of the FWPCA Amendments, authorizes EPA to issue an NPDES permit extending the July 1, 1977, compliance date. As the court of appeals correctly concluded, the July 1, 1977, compliance date for effluent limitations based upon use of the best practicable control technology currently available is "a rigid guidepost" (Pet. App. 10a-11a).

Despite the unambiguous nature of Section 301(b) of the FWPCA Amendments, Bethlehem contends that the Administrator of EPA acted arbitrarily in refusing to extend the compliance date for its Bethlehem, Pennsylvania, facility beyond July 1, 1977. In support of that contention, Bethlehem points to the definition of "effluent limitation" contained in Section 502(11) of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1362. The phrase "effluent limitation" is defined in Section 502(11) to mean "any restriction established by a State or the Administrator [of EPA] on quantities, rates, and concentrations of * * * constituents which are discharged from point sources * * *, including schedules of compliance." According to Bethlehem, the fact that an effluent limitation encompasses "schedules of compliance" means that "the requirement of Section 301 can be met if, on July 1, 1977, a point source is on an approved and enforceable schedule of compliance which will require the completion of installation of best practicable control technology as expeditiously as practicable" (Pet. 11).

This construction of the FWPCA Amendments would render largely meaningless the specific compliance dates set forth in Section 301. Although an "effluent limitation" is defined broadly to include "schedules of compliance," the FWPCA Amendments do not leave the Administrator at large in determining what effluent limitations and schedules of compliance to impose. In the clearest of terms, Section 301(b) of the FWPCA Amendments requires that effluent limitations for point sources, requiring application of the best practicable control technology currently available, "shall be achieved * * * not later than July 1, 1977 * * *" (33 U.S.C. (Supp. V) 1311(b)). As the legislative history cited by the court of appeals demonstrates "all discussion of [the July 1, 1977] date * * * indicates that Congress viewed it as an inflexible target" (Pet. App. 11a).[1]

Bethlehem's suggestion (Pet. 8-9) that the Administrator's construction of the FWPCA Amendments exposes it to penalties in excess of $25 million provides no basis for a contrary construction conflicting both with the terms of the FWPCA Amendments and the associated legislative history. In any event, the suggestion assumes an unwarranted insensitivity on the part of EPA and the courts to possible enforcement actions. The stipulation signed by the parties (Pet. App. 30a-34a) doubtless would preclude a successful criminal action

---

[1]The legislative history of Section 502(11) of the FWPCA Amendments reveals that the phrase "schedules of compliance" was included in the definition of "effluent limitation" to make clear that control requirements would be more than narrative statements of obligation and to enable the Administrator of EPA to bring enforcement actions prior to July 1, 1977. S. Rep. No. 92-414, 92d Cong., 1st Sess. 41-42, 77 (1971).

against Bethlehem for willful or negligent violation of the FWPCA Amendments, and would make a civil enforcement action by EPA highly unlikely (see Pet. App. 6a). Moreover, even if a citizen suit were brought pursuant to Section 505 of the FWPCA Amendments, 33 U.S.C. (Supp. V) 1365, there is no reason to believe that the court would refuse to take into account Bethlehem's peculiar circumstances in fashioning appropriate relief. If an enforcement action were brought against Bethlehem, and penalties were imposed, Bethlehem could raise the due process arguments alluded to in its petition (Pet. 12). But at present, those arguments are at best premature.

The relief Bethlehem seeks can come only from Congress.[2] See *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246; *City of Santa Rosa* v. *Environmental Protection Agency*, 534 F. 2d 150 (C.A. 9), judgment vacated and remanded *sub nom. Pacific Legal Foundation* v. *Environmental Protection Agency*, No. 75-1875, December 6, 1976; *State Water Control Board* v. *Train*, 424 F. Supp. 146 (E.D. Va.), appeal pending, C.A. 4, No. 76-1320. Congress has demanded compliance by July 1, 1977, with effluent limitations based upon application of the best practicable control technology currently available. EPA has done no more than implement that mandate in the NPDES permit issued to Bethlehem.

---

[2]In fact, a bill presently is pending before Congress that would extend the compliance date for publicly-owned treatment facilities beyond July 1, 1977 (H.R. 3199). Although that bill, if enacted in its present form, would not benefit Bethlehem, it does indicate that Congress is aware of problems that are developing with respect to the July 1, 1977, compliance date.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

ALFRED T. GHIORZI,
THOMAS A. PURSLEY, III,
Attorneys.

MARCH 1977.